No. 79-1171

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN SUPPORT OF RESPONDENTS AS AMICUS CURIAE, ON BEHALF OF CAN MANUFACTURERS INSTITUTE, GLASS PACKAGING INSTITUTE, FLEXIBLE PACKAGING ASSOCIATION, COMPOSITE CAN AND TUBE INSTITUTE, AND MILK INDUSTRY FOUNDATION

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INTEREST OF AMICI

This *amicus curiae* brief is filed under Rule 36.2 of the Rules of this Court, with written consent of all the parties to the case.

Amici here comprise the following organizations: (1) the Can Manufacturers Institute, Washington, D. C., the national trade association of metal and composite can manufacturers, representing 57 can manufacturer members accounting for 85% of the metal cans produced annually in the United States; (2) the Glass Packaging Institute, Washington, D. C., the national trade association of the glass container manufacturing industry, representing 80% of the glass containers manufactured annually in the United States, or 320,763,000 gross of containers; (3) the Flexible Packaging Association, Cleveland, Ohio, a trade association representing manufacturers of flexible packaging products constructed of paper, aluminum foil, plastic film, or a combination of such materials; (4) the Composite Can and Tube Institute, Washington, D. C., a trade association representing manufacturers of composite cans, tubes, cores, ribbon blocks, cones, bobbins, mailing packages, spools and related products; and (5) the Milk Industry Foundation, Washington, D. C., a trade association representing processors, manufacturers, and distributors of fluid milk and fluid milk products.

The Minnesota statute here at issue, which makes it a crime to sell milk in nonreturnable, nonrefillable plastic containers, violates the Commerce Clause of the United States Constitution, U. S. Const. art. I, § 8, cl. 3. By this embargo, the State of Minnesota arbitrarily and intentionally seeks to discriminate against interstate commerce in a safe, useful and environmentally sound product. These *amici* who manufacture packaging have cause to be concerned that other packaging will be banned next by Minnesota or any other State, without a rational basis. Minnesota's ban disregards the fundamental purpose of the Commerce Clause: to ensure that "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every Market in the nation, that no home embargoes will withhold his exports, and no foreign state will by customs duties and regulations exclude them." *H. P.*

Hood & Sons v. *Du Mond, Inc.*, 336 U. S. 525, 539 (1949). Packaging manufacturers are entitled to no less a guarantee.

The Minnesota District Court, after trial, held that the statute deprived plaintiffs of equal protection of the law and constituted an unreasonable burden upon interstate commerce, in violation of the United States Constitution. The Minnesota Supreme Court, in affirming, declared the statute violative of the equal protection clause of the fourteenth amendment, holding that it was not rationally related to a legitimate state interest, and in any case would not achieve the State's desired objective. Pet. App. at A-32, 35.*

Amici, arguing herein for affirmance of the state courts' decisions, choose to emphasize the Commerce Clause ground because the basic right to an untrammeled nationwide commerce in packaging affects them directly. In addition, *amici* believe the Minnesota statute will have a severe practical effect on them, causing serious economic consequences to the container industry. This ban, moreover, will have negative impacts well beyond the borders of the State of Minnesota, because lines of industry do not track those of geography.

Amici represent a wide variety of businesses which operate nationwide, producing and distributing packaging for various products, from metal cans and glass bottles to flexible and composite packaging. Although some of this packaging (such as glass bottles) in theory may reap an economic benefit from the Minnesota statute, any short term gain is totally outweighed by the destructive nature of a protectionist embargo on interstate commerce. The Milk Industry Foundation represents processors and distributors of fluid milk, the beverage arbitrarily singled out by the Minnesota statute; in addition, it numbers as associate members producers of ingredients, equipment, and other goods and services involved in milk processing, including manufacturers of packaging materials and equipment. The mem-

* "Pet. App." refers to the Petitioner State of Minnesota's Appendix filed in this Court, "Pet. Brief" to its Brief.

bers of these five organizations engage in billions of dollars worth of business annually, which now moves freely across state lines.

SUMMARY OF ARGUMENT

The Minnesota statute making it a crime to sell milk at retail in nonreturnable plastic containers is *per se* violative of the Commerce Clause. Though labeled an environmental measure, the ban on plastic milk containers in design and effect protects local economic interests, at the expense of embargoing interstate commerce in a safe and useful package.

The Minnesota legislators have deliberately chosen to bestow important competitive advantages on some local dairies and on the in-state pulpwood industry, to the detriment of the out-of-state plastics and packaging industry that produces the banned bottles. The adverse impact on the flow of goods in interstate commerce will be disproportionate, in regard to both the packaging industry and the milk industry.

The legislative history of the Minnesota enactment demonstrates conclusively that it was designed to protect private in-state economic interests from out-of-state competition. In addition, the statute as applied will inevitably result in the promotion of Minnesota economic interests at the cost of imposing an impermissible burden on interstate commerce, similar to the burden deemed unconstitutional in an unbroken line of cases striking down state attempts to build barriers against access to in-state markets by out-of-state sellers and buyers.

The severe impact on those who manufacture the packaging and related products ultimately serving the Minnesota milk market, the majority of which are interstate businesses, is not an incidental burden on commerce justified by legitimate state concerns. The environmental rationale invoked by the State

to bolster the statute cannot withstand the holding of both the Minnesota District Court after a trial and the State Supreme Court that the State's purported interest was in no way advanced by the plastic milk container ban. Nor can Minnesota argue under applicable precedent that the "environmental" label and the "local" nature of the dairy industry call for a less stringent review of this legislation under Commerce Clause standards.

The Minnesota statute must fall as an economically protectionist measure which, both in design and in effect, is contrary to the fundamental principle established in Commerce Clause cases: that "one state in its dealings with another may not place itself in a position of economic isolation." *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511, 527 (1935).

ARGUMENT.

I.

THE MINNESOTA BAN OF PLASTIC MILK BOTTLES IS PER SE INVALID ECONOMIC PROTECTIONISM

Recent decisions of this Court have reaffirmed the principle that state regulations of interstate commerce will be measured against the Commerce Clause based upon the actual or intended effects of the regulation. If "simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity" is applied. *Philadelphia* v. *New Jersey*, 437 U. S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2015 (1980).* If, however, the legislation "visits its effects equally upon both interstate and local business," then a balancing of the burden on commerce against the putative benefits involved is necessary. *Pike* v. *Bruce Church, Inc.*, 397 U. S. 137, 142 (1970).

The Minnesota statute cannot survive Commerce Clause scrutiny under either test. But since this statute is demonstrably invalid as bare economic protectionism of certain in-state industries, this Court need not engage in the delicate process of balancing the benefits against the burdens. Here, in-state

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* *Per se* invalid legislation includes that which captures and holds employment and business that otherwise might go to other states, *Toomer* v. *Witsell*, 334 U. S. 385 (1948); *Foster-Fountain Packing Co.* v. *Haydel*, 278 U. S. 1 (1928); overtly prevents foreign enterprises from competing in local markets, *Lewis* v. *BT Investment Managers, supra;* isolates the state from a common problem by erecting a barrier to interstate trade, *Philadelphia* v. *New Jersey, supra;* or excludes an imported product in order to protect an in-state industry from out-of-state competition, *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935); *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U. S. 361 (1964).

industry is the only beneficiary of this statute. The nationwide packaging industry shoulders the burden. The citizens of Minnesota and their environment will not benefit.

Because the *per se* test is so stringent, any challenge to state regulation under the Commerce Clause will naturally attempt to come within its aegis. In this instance, however, respondents have demonstrated to the Minnesota State courts and can show this Court that the Minnesota statute was an economic protectionist measure from its very inception, and that the after-the-fact rationalizations resurrected in its defense by counsel ring hollow.

Not only does the legislative history demonstrate that the statute was designed with an impermissible parochial motive, but the effect of the statute is to insulate certain in-state interests from the uncertain, but constitutionally protected, vagaries of a national market. As this Court has aptly pointed out, "the evil of protectionism can reside in legislative means as well as legislative ends." *Philadelphia* v. *New Jersey*, 437 U. S. at 626. The result of Minnesota's misguided effort is an adverse impact on interstate commerce with no concomitant environmental benefit to the state whatever.

A. The Legislation Is Hostile in Concept and Design to an Interstate Market

The legislative history supporting the challenged enactment contributes to an understanding of the legislature's purpose, aiding in interpreting and predicting consequences of the legislation.* Thus, in two recent decisions invalidating similarly parochial legislation, this Court specifically noted the impetus supplied for passage by the in-state protected class. In *Lewis*

* *Philadelphia* v. *New Jersey*, 437 U. S. at 626. *See also* Note, *State Environmental Protection Legislation and the Commerce Clause*, 87 Harv. L. Rev. 1762 (1974), discussing the principle that an impermissible purpose behind a state enactment (whether explicit or implicit) contributes to its invalidity.

v. *BT Investment Managers, supra,* the Florida statute was amended to exclude out-of-state investment firms in "direct response" to the pending application of an outside trust company to enter the Florida market, which amendment "had the strong backing of the local financial community." 100 S. Ct. at 2013. And in *Hunt* v. *Washington State Apple Advertising Comm'n,* 432 U. S. 333 (1977), the protected class of in-state apple producers was deemed "mainly responsible for this legislation being passed." *Id.* at 352.

Here, the legislative history supporting this statute demonstrates that the statute was designed as protectionist legislation. The Minnesota Supreme Court found that the statute was intended to "isolate from interstate competition the interests of certain segments of the local dairy and pulp wood industries." Finding No. 23.* The Minnesota District Court similarly held:

> ". . . the actual basis [of the legislation] was to promote the economic interests of certain segments of the local dairy and pulp wood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry." Finding No. 12, Pet. App. at A-19

A protectionist motive—"to protect private economic interests in the state from the forces of the interstate market"**—is the only consistent interpretation that can be derived from the statements of the sponsors of this measure in the Minnesota legislature. These statements intone two themes: the bill was designed to shelter the smaller dairies in Minnesota from conversion to plastic containers to meet market demand, and at the same time maintain the revenues of the Minnesota wood fiber industry. Hostility toward the plastics industry, viewed an out-of-state interloper, was evident in the legislature.

Supporters of the legislation believed it was necessary because plastic containers, in the words of the bill's chief sponsor in

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* Pet. App. at A-31.

** *Reeves, Inc.* v. *Stake,* 48 U. S. L. W. 4746, 4751 n. 1 (1980) (Powell, J., dissenting).

the Minnesota Senate, would "require a major capital investment on the part of the dairies. This creates a hardship on the small dairies of our state." Pet. Brief at 10.* Similarly, Rep. Willard Munger, the bill's chief sponsor in the House and one of its authors, feared that plastic bottles would place the "small independent dairies . . . at a competitive disadvantage;" those dairies, he stated, "believed a shift to the throwaway plastic milk bottle would force them out of business in Minnesota. We have 38 of those small independent dairy operators in our state." Transcript at 115.

In addition to protecting local dairies, the Minnesota legislators sought to encourage use of paperboard containers for milk to "help promote Minnesota's natural resources, the wood fiber industry." Transcript at 115 (Testimony of Rep. Munger). Senator Ulland warned in debate that the bill was needed to ensure that the plastic milk container would not "knock out" paper containers: "That is going to have a significant effect on Northern Minnesota on our tax revenue on the employees and employers. That is why we have got to defeat this motion [to refer the bill to Committee] and pass the Bill." Transcript at 123.

The bill's supporters in the Minnesota legislature made no attempt to hide their bias toward "out-of-state" economic forces. The State of Minnesota itself in its brief in this Court quotes the bill's chief sponsor, Rep. Munger, who justified its enactment: ". . . so that the plastic industry isn't going to get a stranglehold in Minnesota . . ." Pet. Brief at 12; Transcript at 121. Rep. Munger, explicit in his disdain for outside industry, rebuked a fellow representative's motion to refer the bill back to the Agriculture Committee as follows: "I oppose your motion and I am surprised at you representing the dairy

* Testimony of Sen. William Luther, quoted at 121 of Exhibit J, a full transcription of the floor debates in the Minnesota Legislature which was admitted in evidence in the District Court [hereinafter cited as Transcript].

industry and the farmer (inaudible) the guys in the alligator shoes from New York and Chicago come here and tell you how to run your business." Transcript at 118.

Xenophobia was rampant in the legislature, as illustrated by Senator James Ulland in debate:

> There are important economic considerations in this Bill and perhaps they are more important than the environmental considerations . . . I don't think there is anything the matter with supporting the timber industry which is our third largest employer in the state. I think in fact that is one of our responsibilities to keep a healthy economy in the state rather than importing petrochemicals and importing plastic bottles from Chicago or wherever they are manufactured, certainly the natural resources aren't from here.

Transcript at 122-23.

Senator Ulland's frank recognition that the "economic considerations" behind the bill overshadowed "environmental considerations" was echoed by the bill's opponents, who saw the bill in its true light as: "an inter-industry economic struggle. It is not an environmental Bill at all . . ." Transcript at 122 (Testimony of Sen. Collin Peterson).*

The timing and rush to enactment of the statute indicates further that it was designed as a local economic protectionist measure. Passed just as "major structural change in the Minnesota market appeared to be imminent," Pet. Brief at 7, the legislation was enacted as plastic containers for milk were enjoying consumer acceptance and orders were to be placed with an out-of-state firm for over $1 million worth of machines to produce the containers. Pet. Brief at 7, 45.

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* See also statement of Sen. Dunn: "It came in originally under the guise of an environmental issue . . . During the course of that testimony, as Senator Peterson pointed out, it became obvious that it is not really an environmental issue, that the problem here is the desires and concerns and the economic gain between two different parts of the dairy industry . . ." Transcript at 123-124.

The legislature was moved by an intent to protect constituents, which may be proper in other circumstances. When interstate commerce is burdened (or embargoed, as in this case), such motives and effects cannot be tolerated if a truly unfettered national market is to be maintained. Hiding behind "the environment" cannot save such a misguided ban. The legislation was enacted to benefit a favored class: the local producers engaged in the pulp wood industry and the local dairies who sought protection from competitors using plastic milk containers.* The economic interests of both in-state dairies and the in-state wood pulp industry stood to benefit enormously from this legislation, a fact which belies the State's insistence that it is even-handed legislation.

B. The Legislation Is Hostile in Its Effect on Interstate Commerce

Not only is the Minnesota statute hostile in design to the principle of a national market, but it is hostile in effect to the operation of a free market and imposes an impermissible burden on interstate commerce. As this Court has noted, the concluding focus of the initial Commerce Clause inquiry is the "practical operation of the statute, since the validity of state laws must be judged chiefly in terms of their probable effects." *Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2016 (1980); *Hughes* v. *Oklahoma*, 441 U. S. 322, 336 (1979). Whether the statute at issue here was designed to insulate the State's economy (as the legislative history shows) or was inspired by environmental considerations, the practical result is that Minne-

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* *Cf. Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978), where this Court upheld Maryland's legislation prohibiting local retail operations by vertically integrated petroleum companies in the face of Commerce Clause attack, finding that the statute would not in fact discriminate against interstate business in favor of locally-based competitors "because, as a matter of fact, there were no local producers or refiners to be favored." *Lewis*, 100 S. Ct. at 2018.

sota attempted to achieve its aim by impermissibly protecting its own in-state industries from out-of-state competition.

The long line of cases involving state regulation of milk are directly relevant, though Minnesota has attempted to regulate the packaging of milk rather than the product itself. In all of the "milk cases," this Court has found an undue burden on interstate commerce where the principal purpose or effect was to protect local economic interests from out-of-state competition—as is the case here.

Years ago, New York State made arguments similar to those raised here by Minnesota in its futile attempts to justify laws imposing conditions on the processing or sale of milk. In *Baldwin* v. *G. A. F. Seelig, Inc.*, 294 U. S. 511 (1935) and *H. P. Hood & Sons, Inc.* v. *Du Mond*, 336 U. S. 525 (1949), the decisions found simple economic protectionism to be the effect of New York's laws, neither of which was "supported by health or safety considerations but solely by protection of local economic interests . . ." *Hood*, 336 U. S. at 531. The Court in doing so stressed the basic principle that a "state may not promote its own economic advantages by curtailment or burdening of interstate commerce." *Id.* at 532.

In *Baldwin*, the legislation prohibited the sale of milk imported from another state unless the price paid in the other state to the producer was up to the minimum prescribed by New York for purchases from local producers—a measure characterized by this Court in the *Hood* case as "designed in practical effect to exclude" imported milk from being sold in New York. *Hood*, 336 U. S. at 531. In *Hood*, another New York statute was struck down when it, as applied, denied a Massachusetts milk disributor the right to operate an additional milk receiving plant in New York, and in effect withheld New York milk from export. *Id.* at 531. All manner of ingenious rationale were used to justify these laws—to no avail because of their obvious aim and effect.

The Minnesota statute here discriminates against interstate commerce, establishing an "economic barrier against competition with the products of another state," *Baldwin*, 294 U. S. at 527, in two fundamental ways: (1) it imposes a restraint (and in some situations an absolute prohibition) on access to Minnesota markets by out-of-state milk sellers, plastic manufacturers, resin manufacturers, and other related businesses; and (2) it imposes a restriction on out-of-state buyers seeking access to Minnesota milk and other related products such as plastic milk bottles produced in the state. In both cases, the beneficiaries of the economic barrier are in-state industries.

In terms of the probable effects of this statute*, a major adverse impact will fall on out-of-state producers of equipment and machinery used in the production of plastic bottles (i.e., plastic blow molding equipment, plastic containers, and resin). Not one of the raw material manufacturers of pellets or plastic blow molding machines is located within the state of Minnesota. Transcript at 309. In fact, the trial court found that some businesses will be forced out of the Minnesota market entirely. Pet. App. at A-22, Finding 24. Further, manufacturers of plastic bottles, who are overwhelmingly located out-of-state, will also be forced out of the Minnesota market. The statute will also have a "ripple" effect on those manufacturers of plastic compo-

* The Minnesota trial court, in concluding that the Act imposes unconstitutional burdens on interstate commerce, found that the Act if implemented would prevent out-of-state dairies who market in Minnesota from marketing in nonreturnable plastic containers; would prevent in-state dairies from marketing milk interstate in such containers or marketing such containers interstate; would prevent plastic container manufacturers from marketing such containers interstate; would prevent manufacturers and distributors of blow molding equipment in interstate commerce from selling such equipment in Minnesota for the purpose of fabricating nonreturnable plastic milk containers; and would prevent out-of-state suppliers of polyethylene resin in interstate commerce from selling their product in Minnesota for the purpose of fabricating nonreturnable milk containers. Pet. App. at A-22, Finding 24.

nents, machines, or bottles who, because of the loss of the milk business in Minnesota, may also be precluded by economic factors from competing for business involving plastic bottles used for other purposes, such as packaging fruit juices or water. A further adverse impact will be felt by the out-of-state dairies who attempt to market within Minnesota in one type of container and outside the State's boundaries in another container; some may choose to cease selling in Minnesota altogether: a classic balkanization of interstate commerce.

Not surprisingly, based on the leglisative intent, the beneficiaries of this economic dislocation will be local Minnesota dairies without investments in plastic bottle equipment and the Minnesota pulp wood industry. The statute will, in effect, force all milk producers to sell only in paperboard containers in Minnesota since that container will be the only nonreturnable, nonrefillable container widely available. The trial court found, and Petitioner has admitted, that the statute was designed to and "would increase the use of a more expensive and environmentally harmful, non-returnable, non-refillable paperboard container." Pet. App. at A-20, Finding 14; Pet. Brief at 13, 42.

This barrier against access to Minnesota markets by out-of-state sellers parallels that constructed by North Carolina in *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. 333 (1977). There, North Carolina's attempt to prescribe certain grading designations on closed containers of apples shipped into the state was invalidated on the ground that it raised the cost of doing business in the state only for out-of-state growers, thus building a wall around the local industry. Here, because of the absence of in-state producers of plastic blow molding equipment, or resin suppliers, and the virtual absence of container manufacturers, the most serious impact will fall on out-of-state businesses (whether engaged in packaging or in the milk industry itself) who wish to sell their products in Minnesota.

Another Minnesota statute was struck down on the same basis because it resulted in a windfall to those sellers engaged in the business within Minnesota at the expense of those from out-of-state. In *Minnesota* v. *Barber*, 136 U. S. 313 (1890), this Court found that a Minnesota statute requiring that animals slaughtered for human food had to be inspected by local inspectors within 24 hours in effect excluded fresh meat from the Minnesota market (although entirely fit for human consumption)* from animals slaughtered in other states.

The facts in cases such as *Hunt* and *Barber*, where the invalid statutes explicitly favored in-state dealers, contrast with *Exxon Corp.* v. *Governor of Maryland*, 437 U. S. 117 (1978). There, the Maryland statute prohibiting local retail operations by vertically integrated petroleum companies was upheld because it conferred no such competitive advantage on in-state dealers at the expense of out-of-state dealers. *Id.* at 126.** In *Exxon*, the out-of-state dealers were not a target of the state legislation, nor were they affected adversely by it. Further, this Court specifically noted that "the Maryland statute does not discriminate against interstate goods," *Id.* at 125, unlike this action, where Minnesota has chosen to ban only plastic packag-

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* Similarly here, Minnesota's ban on plastic milk containers will inevitably result in the burdening of commerce in a legitimate and healthy food, namely the milk itself. This is quite different from situations where a state has been allowed to ban importation of noxious articles, such as diseased livestock, where the state "did not discriminate against interstate comerce as such, but simply prevented traffic in noxious articles, whatever their origins." *Philadelphia* v. *New Jersey*, 437 U. S. at 629.

** "In fact, the Act creates no barriers whatsoever against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which the State has been found to have discriminated against interstate commerce." *Exxon*, 437 U. S. at 126.

ing, thereby affecting interstate goods for the economic benefit of alternate in-state packaging materials.

II.

THE MINNESOTA BAN OF PLASTIC MILK BOTTLES CANNOT BE JUSTIFIED ON THE GROUNDS ADVANCED BY THE STATE

To avoid the impact of the protectionist nature of the statute, Minnesota argues that it should not be subject to close Commerce Clause scrutiny for three reasons: 1) it is an environmental measure, 2) with even-handed application to both local and interstate commerce, which 3) affects only a "localized" industry. None of these arguments is sufficient to shield this statute from the close examination it deserves under the Commerce Clause.

A. The Minnesota Statute Is Not an "Environmental Measure"

Labeling the Minnesota statute an "environmental measure" does not alter its purpose or effect on interstate commerce. This statute is not entitled to special deference because its *post facto* justifications relate to preservation of the environment.* In fact, these justifications are groundless, as shown by the record.

As this Court pointed out in *Philadelphia* v. *New Jersey,* 437 U. S. 617 (1978), while a state has every right to attempt to protect its environment, it may not do so by protecting itself from interstate commerce. In that action, this Court found that a New Jersey statute prohibiting the importation of most solid or liquid waste which originated or was collected outside New Jersey violated the Commerce Clause. *Id.* at 624. Numerous

* In reviewing a statute under Commerce Clause standards, this Court is not bound by "the name, description or characterization given it by the legislature or courts of the state." *Hughes* v. *Oklahoma,* 441 U. S. at 336.

environmental justifications were raised in support of the statute, including the argument that it was intended to protect the remaining New Jersey landfill sites. However laudable the purpose, this Court held, "it may not be accomplished by discriminating against articles of commerce coming from outside the state unless there is some reason, apart from their origin, to treat them differently." *Id.* at 626-27. Parochial legislation is invalid under the Commerce Clause no matter what its arguable ends, for "the evil of protectionism can reside in legislative means as well as legislative ends." *Id.* at 626.

Here, the arguable ends amount only to a legalistic smokescreen laid down to obscure the protectionist effect of the statute. This smokescreen evaporated at trial, when credible support was not found for the "environmental" rationale.

The "environmental" justification here is similar to assertions in the other milk cases that the challenged statutes were only protecting the health of their citizens rather than their economic well-being. For example, in *Baldwin* v. *Seelig, supra,* New York argued that the statute was a valid exercise of state police power, and that the economic motive was "secondary and subordinate" to the motive of making its "inhabitants healthy." 294 U. S. at 523. The argument said too much:

> Economic welfare is always related to health, for there can be no health if men are starving . . . To give entrance to that excuse would be to invite a speedy end of our national solidarity. The Constitution was framed under the dominion of a political philosophy less parochial in range. It was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.

Id. Similarly, in *Dean Milk Co.* v. *Madison,* 340 U. S. 349, 354 (1951), this Court rejected the view that the challenged ordinance should be held valid "simply because it professes to be a health measure."

The Minnesota statute here simply is not an environmental measure. If it were, it would not fall so woefully short of responding to any legitimate environmental concern other than by lip service. First, the record in this action shows that the statute cannot promote the use of refillable containers because such containers were largely extinct in the state before the statute was enacted. Thus, the Minnesota milk market will return to paperboard cartons, and not refillables—a result the legislature intended. Pet. App. at A-42, 43; Record at 339-40, 427.

Second, the statute cannot further any solutions to solid waste disposal problems in Minnesota or elsewhere. As demonstrated by the trial record, the plastic container presents fewer solid waste problems than paperboard in all respects, which even a cursory analysis would have confirmed. *See* Pet. App. at A-21. The legislature, however, was understandably not interested in these facts because the focus of the statute was directed elsewhere: at the protection of local industry.

The *amicus* brief of the United States emphasizes this so-called "environmental" issue as well. It is the right argument in the wrong case. With scant reference to the evidence, the United States assumes that the State of Minnesota has embarked upon a noble experiment in this ban, with alternative solutions to problems of solid waste disposal and energy conservation. Thus, the United States argues that Minnesota should be encouraged, even if the statute is "under-inclusive" and imperfect. Brief for United States at 8-9. Sadly, the record demonstrates that this is not that case. The Minnesota statute can only be viewed as an experiment if its legislative history is ignored, its impact on interstate commerce glossed over, and its absence of rational relationship to environmental reality disregarded. The Minnesota statute is not a noble experiment; it is base isolationism.*

* Nor is the Minnesota statute comparable to local mandatory deposit laws relating to beer and soft drink containers, which have unsuccessfully sought to solve perceived problems by positive and negative monetary incentives.

B. The Minnesota Statute Is Not "Even-Handed" in Its Application

Minnesota also argues that the law affects in-state as well as out-of-state interests evenly and "applies uniformly to all affected products regardless of point of origin." Pet. Brief in Minn. Sup. Ct. at 73. The argument misses the point. The Minnesota interests may also be affected is immaterial under the Commerce Clause. In *Dean Milk Co., supra,* the challenged ordinance was deemed violative of the Commerce Clause, although it affected in-state as well as out-of-state milk producers: "It is immaterial that Wisconsin milk from outside the Madison area is subjected to the same proscription as that moving in interstate commerce." 340 U. S. at 354, n. 4*. The same argument also failed in *Philadelphia* v. *New Jersey,* 437 U. S. at 626. There, the State pointed to the fact that New Jersey landfill operators were among the plaintiffs as evidence that the statute would not benefit New Jersey commercial interests at the expense of out-of-state ones. This Court rejected the argument, finding such an in-state/out-of-state distinction was too restrictive; the real issue is whether the State has attempted to achieve its goal "by the illegitimate means of isolating the State from the national economy." *Id.* at 627.

In some instances this Court has deferred to certain state regulations when "their burden usually falls on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome regulations." *Raymond Motor Transporta-*

* See also *Minnesota* v. *Barber,* 136 U. S. at 326; *One-Way Disposal, Inc.* v. *City of Portland,* 14 E. R. C. 1577 (D. C. Or. 1980), where the District Court held that the City of Portland's ordinance closing its only public landfill to garbage collected outside the metropolitan Portland area, including garbage coming in from the State of Washington, violated the Commerce Clause, rejecting the defendant's assertion that the Portland ordinance was valid because it prohibited some intrastate as well as interstate garbage.

tion, Inc. v. *Rice,* 434 U. S. 429, 444, n. 18 (1978). *See also South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U. S. 177, 187 (1938); *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 783 (1938); L. Tribe, *American Constitutional Law,* § 6-5 (1978). Here, however, the burden of the Minnesota law banning plastic milk containers falls on out-of-state businesses which had previously competed in all aspects of the milk container industry. Though the legislature did not artlessly target interstate commerce in the wording of the statute, the effect is identical. The injured parties, as intended, are the businesses from outside Minnesota. Unlike *Barnwell,* where the state regulation affected shippers equally whether in interstate or intrastate commerce, here the Minnesota statute benefits in-state industry at the expense of out-of-state competitors, thus eliminating any incentive for Minnesota's own political processes to temper the effect of its ban on plastic milk containers.* Minnesota here has accomplished what the Court forbade in *Philadelphia* v. *New Jersey,* 437 U. S. at 627, when New Jersey attempted to isolate itself from the national economy in an important area of commerce.

C. The Minnesota Statute Is Not Saved Because It Relates to a Business of Local Concern

The State of Minnesota here seeks to rely on the localized nature of the dairy industry to escape scrutiny under Commerce Clause standards. Pet. Brief in Minn. Sup. Ct. at 77. Yet labeling an interest "local" does not end the analysis. The State must still act in a manner consistent with the Commerce Clause principle that one state may not "erect barriers against interstate trade." *Lewis* v. *BT Investment Managers, Inc.,* 100 S. Ct. at 2015 (1980). In *Lewis,* this Court found regulation of "bank-

* *Cf. Can Manufacturers Institute* v. *Minnesota,* 289 N. W. 2d 416, 420 (Minn. 1979), where the Minnesota Supreme Court upheld a packaging review act, finding that it was not . . . "designed or will operate in favor of local interests."

ing and related financial activities" to be "of profound local concern," yet nevertheless invalidated the Florida statute there as unconstitutional. Here, the "local concern" is even less evident, since the statute does not regulate the local dairy industry except peripherally by prescribing its containers. In fact, the regulation is of the packaging industry, which was recognized as the out-of-state culprit.

To focus inappropriate attention on the in-state dairy industry and minimize the burden on interstate commerce, the State of Minnesota has cited *Milk Control Board* v. *Eisenberg Farm Products,* 306 U. S. 346 (1939), for the proposition that "the effective selling radius of most dairies is relatively small." Pet. Brief in Minn. Sup. Ct. at 77. Although the *Eisenberg* case noted that only 10 percent of the milk produced in the state was destined for interstate commerce, in that particular case the statute regulating the milk industry was upheld only because its impact on interstate commerce was "incidental," as this Court pointed out in *H. P. Hood* v. *Du Mond,* 336 U. S. at 530, in distinguishing the *Eisenberg* holding. In the *Hood* case, on the other hand, the state milk regulations were "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local interests." *Id.* at 530-31. The ban on plastic milk containers here also has the "avowed purpose" and "practical effect" of cordoning off the Minnesota market to outside competition, a discriminatory impact that invocation of "local concern" can not overcome.

D. The Legislation Does Not Advance Legitimate State Policies

Given the disparate impact of this legislation on interstate commerce to the benefit of local industry, the burden falls on the State of Minnesota "to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local in-

terests at stake." *Hunt* v. *Washington State Apple Advertising Comm'n*, 432 U. S. at 353 (1977); *Dean Milk*, 340 U. S. at 354; *Great Atlantic & Pacific Tea Co.* v. *Cottrell*, 424 U. S. 366, 375 (1976); *Lewis*, 100 S. Ct. at 2018-19. Minnesota has not succeeded in justifying this law, and both Minnesota courts found that the evidence here demonstrates that none of the State's purported goals are credibly advanced by this statute.

The State argues that three interrelated state policies are served by the ban on plastic milk containers: (1) to halt the proliferation of the plastic containers before they "become irreversibly dominant in the market and before there developed such economic reliance upon the plastic container—in the form of capital investment and employment—that eradication of this admittedly-bad container would entail great social and economic dislocation" (Pet. Brief at 12); (2) to conserve nonrenewable fossil fuels, since the polyethylene from which plastic milk containers are made is refined from either crude oil or natural gas, while paper-board containers are produced primarily from wood pulp; and (3) to deal with the solid waste problem, "particularly the landfill space which would be consumed by throwaway plastic jugs." Pet. Brief at 22. These are obviously legitimate state interests. Not one them is served by this legislation. The only goal served by the statute is the protection of local industry.

The first purported environmental goal, to prohibit the plastic container before it becomes dominant in the market, is tenuous at best, and depends upon the credibility of other goals. Minnesota contends that because the alleged problem of the plastic container is still "on the horizon," this statute was passed to check its growth, which the State believes to be "virtually unstoppable once it gains a foothold in a market" as a result of "its consumer convenience features." Pet. Brief at 6. The State's interest in nipping the plastic milk container in the bud is specious, since the container was intro-

duced in Minnesota long before this act was passed, especially outside of the Minneapolis/St. Paul area. The Supreme Court of Minnesota affirmed this finding. Pet. App. at A-44. The record at trial demonstrated that plastic milk containers were widely used in Minnesota by the early 1970's. Record at 329, 421, 449.

Reduction of solid waste and conservation of energy are both laudable goals. They will not be served by this statute. The District Court rejected the argument that the statute could succeed in any way to effect such purported policy goals, since the vacuum created by the ban on plastic milk containers will be filled by a return to nonrefillable paperboard milk containers. Pet. App. at A-21. The Supreme Court of Minnesota likewise held that the classification separating paper from plastic nonrefillables was not reasonably related to these two state interests (Pet. App. at A-35); paperboard containers are environmentally inferior to plastic on all counts. Pet. App. at A-42. Thus the ban on plastic nonrefillable milk containers not only fails to advance the act's objectives but in fact is counter-productive.

CONCLUSION.

For the foregoing reasons, *amici* herein respectfully request that the judgment of the Supreme Court of the State of Minnesota be affirmed on the ground that the Minnesota ban on plastic milk containers unconstitutionally burdens interstate commerce.

Respectfully submitted,

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